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FINAL ORDER

permit and Permit No. 41419 shall at no time exceed 200 gallons per minute.

4. The issuance of this Provisional Permit by the Department shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 14th day of April, 1983.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 449 - 2872

David L. Pengelly
David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

CASE # 4148

AFFIDAVIT OF SERVICE
FINAL ORDER

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 15, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Bruce O. Gray, Application No. 41418-s43D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Bruce O. Gray, Box 171 A, Joliet, MT 59041
2. Rocky Fork Decreed Water Users Association, Rt. 2, Box 3260, Red Lodge, MT 59068
3. Pat Billingsley, Joliet, MT 59041
4. John Teini, Roberts, MT 59070
5. Keith Kerbel, Billings Field Office (inter-department mail)
6. Dave Pengelly, Hearing Examiner (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 14th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Suey Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 4148

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On February 8, 1982, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by Bruce O. Gray. This Application seeks 270 gallons per minute up to 146.7 acre-feet per annum for new sprinkler irrigation purposes from May 1 to September 1, inclusive, of each year. The proposed point of diversion is in

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the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 4 South, Range 22 East, M.P.M., Carbon County. The proposed place of use is on 40 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in said Section 21. The water is to be diverted from a developed spring.

The pertinent portions of this Application were duly published for three successive weeks in the Red Lodge weekly, a newspaper of general circulation printed and published in Red Lodge, Montana.

One objection to the granting of this application was filed with the Department of Natural Resources and Conservation by the Rocky Fork Decreed Water Users, Inc. on June 21, 1982.

EXHIBITS

The Applicant introduced the following exhibits, to-wit:

- A-1: A hand-drawn map of the developed spring, conveyance facilities and proposed place of use for waters requested pursuant to this permit.
- A-2: Notice of Appropriation filed by L. L. Huddleston for the waters of a spring located in Section 21, Township 4 South, Range 22 East, M.P.M., Carbon County.
- A-3: An affidavit signed by Emil Sikora regarding the use of water from a spring on certain lands in said Section 21.
- A-4: A contract for sale of real estate executed

between Clarence L. and Ruth M. Johnson
(sellers) and Bruce Oneal Gray and Roberta
Barber Gray (buyers).

The Applicant's Exhibits were introduced into the record with
no objections.

No exhibits were introduced on behalf of the Objector.

The Department introduced the following exhibits into the
record, to-wit:

- D-1: Statement of Claim for Existing Water Right
No. W-114723-43D filed by Bruce O. Gray.
- D-2: Statement of Claim for Existing Water Right
No. W-114724-43D filed by Bruce O. Gray.
- D-3: Statement of Claim for Existing Water Right
No. W-114725-43D filed by Bruce O. Gray.
- D-4: Statement of Claim for Existing Water Right
No. W-114727-43D filed by Bruce O. Gray.
- D-5: A three-page exhibit including a soils map of
the Applicant's proposed irrigated lands and
a description of the soils in this area, all
taken from the Carbon County Soils Survey.
- D-6: Exhibit D-6 from a hearing in the matter of
the Application for Beneficial Water Use
Permit No. 42358-43D by Kenneth and Kathryn
Cox was introduced by reference. This
exhibit consists of the water commissioner

records for Rock Creek from 1953 to 1977.

The Department's Exhibits were introduced into the record with no objections.

Based on the information contained in the Department's file in this matter and the information presented at the hearing, the Hearing Examiner hereby makes the following Findings of Fact, Conclusions of Law, and Order:

PROPOSED FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and over the parties hereto, whether they have appeared or not.

2. The Applicant's intended use of water for irrigation purposes is a beneficial use.

3. The Applicant seeks to divert a maximum of 150 gallons per minute, pursuant to this permit.

4. The Applicant's source of water is an existing spring which would be developed to increase its flow.

5. The existing spring is tributary to Rock Creek.

6. The Applicant's maximum period of diversion would be 60 sixteen-hour days at a pumping rate of 150 gallons per minute. Therefore, the Applicant's maximum diversion of water would be 26.5 acre-feet, per annum.

7. The Applicant is seeking to use this water for sprinkler

irrigation purposes on 44 acres of land; 22 acres located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and 22 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, all in Section 21, Township 4 South, Range 22 East, M.P.M., Carbon County.

8. The Applicant has filed Application No. 41418 seeking an additional 150 gallons per minute up to 26.5 acre-feet per annum to be used in conjunction with this application on the same described 44 acres.

9. The Applicant has filed Statement of Claim No. W-114723 to be used on 12 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21.

10. The Applicant has filed Statement of Claim No. W-114724 to be used on 15 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 21.

11. The Applicant has filed Statement of Claim No. W-114725 to be used on 30 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21.

12. Any waters diverted from the source of supply and not used by the Applicant will be conveyed by ditch directly to Rock Creek.

13. The Applicant's proposed project will not decrease the flows of Rock Creek during the irrigation season.

14. There are no pending permits which will be adversely affected by the granting of this permit.

15. There are no existing reservations of water which will be adversely affected by the granting of this permit.

16. The maximum flow rate which the Applicant will divert pursuant to this Application and supplemental Application No. 41418 is 200 gallons per minute.

PROPOSED CONCLUSIONS OF LAW

1. MONT. CODE ANN. 85-2-311 (1981) directs the Department of Natural Resources and Conservation to issue a water use permit if the following conditions or criteria exist:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through 5).

2. The Applicant's intended use of water for irrigation purposes is a beneficial use.

3. The Applicant's proposed means of diversion and construction are adequate.

4. There are unappropriated waters in the source of supply at times when the waters can be put to the use proposed by the Applicant.

5. There are unappropriated waters in the source of supply in the amount the Applicant seeks to appropriate.

6. There are unappropriated waters in the source of supply throughout the period during which the Applicant seeks to appropriate said amount of water.

7. The rights of a prior appropriator will not be adversely affected by the granting of this Application.

8. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued.

9. The proposed use will not interfere with other planned uses or developments for which water has been reserved.

10. The Applicant need not prove by clear and convincing evidence that the above criteria have been met since the Application is for less than 10,000 acre-feet per annum or 15 cubic feet per second.

PROPOSED ORDER

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued:

1. Application for Beneficial Water Use Permit No. 41419-s43D by Bruce O. Gray is hereby granted to divert 150 gallons per minute up to 26.5 acre-feet per annum for sprinkler irrigation of 44 acres from May 1 to September 1, inclusive, of each year. The water shall be diverted by developing an existing spring located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 4 South, Range 22 East, M.P.M., Carbon County. The water shall be used on 22 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and 22 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, all

in said Section 21.

2. This permit is issued subject to existing rights and any final determination of those rights as provided by Montana law.


3. The combined appropriation of water pursuant to this permit and Permit No. 41418 shall at no time exceed 200 gallons per minute.

4. The issuance of this Provisional Permit by the Department shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this Permit, nor does the Department in issuing the Provisional Permit in any way acknowledge liability for damage caused by the Permittee's exercise of this Provisional Permit.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before April 1, 1983.

DONE this 10th day of March, 1983.



David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

CASE # 4149

AFFIDAVIT OF SERVICE
PROPOSAL FOR DECISION

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 10, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Bruce O. Gray, Application No. 41419-s43D, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Bruce O. Gray, Box 171 A, Joliet, MT 59041
2. Rocky Fork Decreed Water Users Association, Rt. 2, Box 3260, Red Lodge, MT 59068
3. Pat Billingsley, Joliet, MT 59041
4. John Teini, Roberts, MT 59070
5. Keith Kerbel, Billings Area Office Supervisor, DNRC (inter-department mail)
6. Dave Pengelly, Hearing Examiner, DNRC (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 10th day of March, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judith L. Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission-expires 3/1/85

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